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SUPREME COURT, U.S.

No. 05-1026

IN THE

Supreme Court of the United States

LEVI HOGNER,

Petitioner,

v.

LEROY M. STRENKE and
JUANITA M. STRENKE,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE STATE OF WISCONSIN COURT OF APPEALS

RULE 15.8 SUPPLEMENTAL BRIEF OF LEVI HOGNER IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF WISCONSIN COURT OF APPEALS

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Levi Hogner filed a petition for a writ of certiorari on February 9, 2006, which has been submitted for conference before this Court on June 15, 2006. The petitioner presents this Supplemental Brief pursuant to Supreme Court Rule 15.8 to advise the Court of intervening matter not available at the time of his petition.

On May 30, 2006, this Court granted the Petition for a Writ of Certiorari to the Supreme Court of Oregon in *Philip Morris USA v. Williams*, No. 05-1256. In that case, the Court will consider two issues:

> 1) Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm;
>
> and
>
> 2) Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

Philip Morris USA v. Williams, 127 P.3d 1165 (Or.), *cert. granted in part*, 74 U.S.L.W. 3665 (U.S. May 30, 2006) (No. 05-1256).

Hogner cited *Philip Morris USA v. Williams*, of course, at page 11 of his February 9, 2006 petition for a writ of certiorari. The *Williams* case, among many others, illustrated the trend, especially among state appellate courts, to ignore this Court's clear command in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

This Court's decision to accept *Williams* for review should not dissuade it from granting Levi Hogner's pending petition. This case presents a constitutional issue distinct from those in *Williams*. Indeed, it would provide a compelling companion to *Williams*. The issue presented by the petition in *Hogner* is:

> Can the state judiciary ignore the constitutional due process requirements for punitive damages, dismissing as "dicta" the standards in *State Farm Mut. Auto Ins. Co. v. Campbell*, to award more than 110 times the $2,000 actual damages in a personal injury/drunk driving case?

While this Court's treatment of *Williams* may well guide the Wisconsin Court of Appeals in any remand, this case requires separate consideration. The facts are distinct from those in *Williams* in one very constitutionally-significant respect. In *Williams*, the plaintiffs' actual damages were substantial. In *Hogner*, they were *de minimus*.

Even if this Court were to remand *Hogner* for application of its decision in *Williams*, the *Hogner* plaintiffs will argue that the *Williams* holding does not apply. The plaintiff in *Williams* suffered substantial actual damages—a death from smoking-related illness. The plaintiffs in *Hogner* suffered only soft tissue injuries with minimal compensatory damages.

To avoid a constitutional violation, the plaintiffs will—as they have in their opposition to the petition—try to manipulate the Court's statement in *State Farm* that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"

State Farm, 538 U.S. at 425, *citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996). Without a decision by this Court separate from *Williams*, the Wisconsin court, on remand, may well ignore once again this Court's binding constitutional directive that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

A decision in *Williams* will not instruct lower courts on the constitutional parameters of punitive awards when a "particularly egregious act has resulted in only a small amount of economic damages." *Id.*, at 425. The threat to due process comes not just in cases alleging mass torts, pervasive or societal harm, and massive injury. Cases like *Williams* are the exception. Cases like *Hogner* are far more common in this country's judicial system and, notwithstanding the respect owed any jury's verdict, a minor injury should not provide a platform for punishment that exceeds the bounds of both the Fourteenth Amendment and common sense. This Court should grant Hogner's Petition for a Writ of Certiorari to address that point of distinction with *Williams*.

For the reasons stated in his Petition for a Writ of Certiorari, the Court should grant Levi Hogner the writ necessary to review and reverse the Wisconsin Court of Appeals. In the alternative, Hogner requests that the Court defer consideration of Hogner's petition until the Court reaches a decision in *Philip Morris USA v. Williams*, No. 05-1256.

Dated: June 7, 2006.

Respectfully submitted,

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